IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 14TH SEPTEMBER 2007 / 23RD BHADRA 1929

SA.No. 548 of 1994(F)

AS.249/1987, IIIRD ADDITIONAL DISTRICST COURT,TRIVANDRUM
OS.237/1984 of PRL.MUNSIFF'S COURT,NEDUMANGAD
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APPELLANTS:RESPONDENTS/PLAINTIFFS 2 TO10:
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1. **BHAVANI AMMA KANAKADEVI, RESIDING AT CHANDRODAYAM, ZHALAKONAM, POONJAMKODU MURI, PERUMKULAM VILLAGE.**
2. **PARAMESWARAN PILLAI, PRATHAPACHANDRAN OF ..DO..DO...**
3. **KANAKADEVI CHANDRAVALLI OF ...DO....DO.....**
4. **PARAMESWARAN PILLAI MOHANACHANDRAN OF ..DO..DO....**
5. **KANAKADEVI CHANDRALEKHA OF ....DO...DO.....**
6. **KANAKADEVI CHANDRAPRABHA OF ...DO...DO....**
7. **KANAKADEVI CHANDRATHARA OF ...DO...DO.....**
8. **PARAMESWARAN PILLAI UDAYACHANDRAN OF ..DO..DO...**
9. **PARAMESWARAN PILLAI SWATHISCHANDRAN OF ..DO...DO..**

BY ADV. SRI.P.GOPAKUMARAN NAIR

RESPONDENTS: APPELLANT:DEFENDANT:

C.S.I. DEKSHINA KERALA MAHA IDAVAKA, THIRUVANANTHAPURAM REPRESENTED BY ITS MANAGER REV.J.W.GLASTONE, RESIDING AT L.M.S. COMPOUND, THIRUVANANTHAPURAM.

BY ADV. SRI.M.BALAGOVINDAN
SRI.L.MOHANAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NO.1071/1994 IN S.A.NO.548/1994

DISMISSED

14/09/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.548 OF 1994

Dated 14th September 2007

J U D G M E N T

Whether a provision in a sale deed that in the event of failure to construct a private college in the property sold thereunder, the property shall be reconveyed by the vendee to the vendor for the same sale consideration is barred under the provisions of Sections 10 or 11 of Transfer of Property Act? This is the question to be decided in the appeal.

2. Plaint schedule property having an extent of 1.12 acres in Sy.No.1871 of Kulathummal village originally belonged to Parameswaran Pilla, the original plaintiff. Appellants are his legal heirs. It was sold to respondent C.S.I.Dakshina Kerala Maha Idavaka for the purpose of construction of a private college under Ext.A2 sale deed on 17/3/1965 for a consideration of Rs.11,200/-. There is a clause in Ext.A2 that if by any reason a college could not be constructed, respondent vendee shall reconvey the property for the same consideration to the plaintiff

assignor. Contending that no college was constructed and as provided under Ext.A2 plaintiff is entitled to get the property reconveyed by respondent and respondent is attempting to dispose the property to third parties, O.S.237 of 1984 was filed before Munsiff court, Nedumangad seeking a decree for a direction to the respondent to execute a sale deed after receiving consideration of Rs.11,200/- and also realisation of mesne profits at the rate of Rs.1,100/-. Respondent resisted the suit contending that clause in Ext.A2 to reconvey the property to the plaintiff is void under Section 10 of Transfer of Property Act and as the absolute title was transferred under Ext.A2, respondent is entitled to deal with the property as they wish and plaintiff is not entitled to compel respondent to sell the property to them for the consideration paid under Ext.A2. On the death of sole plaintiff appellants were impleaded as his legal heirs in the suit. Learned Munsiff interpreting the clause in Ext.A2 found that the said clause is not void and as property was sold to enable respondent to construct a college and respondent had agreed to reconvey the property, in the event of failure to construct the college, in view of the provisions in

Ext.A2, respondent is bound to reconvey the property to appellants as legal heirs of deceased plaintiff. Therefore, a decree was granted directing appellant to deposit Rs.11,200/- before court and on such deposit directing respondent to execute a sale deed reconveying the title to appellants. Respondent challenged the decree and judgment before District court, Thiruvananthapuram in A.S.249 of 1987. Learned Additional District Judge on re-appreciation of evidence found that the clause in Ext.A2 providing for reconveying the property to the vendor is void under Section 10 of Transfer of Properties Act and as provided under Section 54 of Transfer of Property Act, when under Ext.A2 respondent obtained an absolute right over the property, respondent is entitled to deal with the property without any prohibition. Appeal was allowed and the decree granted by the trial court was set aside and suit was dismissed. It is challenged in this appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) Is the finding of first appellate court that recitals in Ext.A2 that property will be reconveyed to the vendor is void under Section 10 of Transfer of Properties Act, is

sustainable.

2) Is the provision in Ext.A2 to reconvey the property to the vendor is enforceable and if so, whether findings of first appellate court is sustainable.

4. Learned counsel appearing for appellants and respondent heard.

5. Argument of learned counsel appearing for appellants is that Ext.A2 does not contain a provision prohibiting the respondent the vendee from alienating the property and it only provides that if respondent fails to construct the college, for which property was purchased, the property shall be reconveyed to the vendor for the same consideration and it cannot be taken as a clause preventing respondent from selling the property to any other person except the vendor and hence that clause is not void as provided under Section 10 of Transfer of Property Act. It was argued that Ext.A2 sale deed was executed pursuant to Ext.A1 agreement for sale whereunder it was specifically agreed to by the parties that the property is being sold and respondent is purchasing the property to enable respondent to construct a college therein and if the college is not constructed, the

property will be reconveyed to the plaintiff and when Ext.A2 sale deed was executed later that agreement was also incorporated in the sale deed and that clause is valid and not void. It was also argued that under Ext.A2 sale deed the property was sold for a much lesser value than what was the prevailing market rate, for the reason that if a college is constructed it would be beneficial to the plaintiff as it would cause enhancement of land value of his other properties and it is on that understanding respondent had agreed to sell the property providing that if college is not constructed, it would be reconveyed and that clause is a personal covenant binding on the respondent and therefore first appellate court was not justified in reversing the decree granted by the trial court.

6. Learned counsel appearing for respondent argued that provisions in Ext.A2 that the vendee shall reconvey the property to the vendor would impliedly prohibit the vendor from selling the property to anybody else and when under Ext.A2 the property was sold to the respondent and it is an absolute sale as provided under Section 54 of Transfer of Properties Act, any clause in the sale deed preventing the vendee from dealing with the property

either by sale or mortgage is void as provided under Section 10 of Transfer of Property Act. It was further argued that first appellate court rightly interpreted Ext.A2 and that findings of the first appellate court are perfectly correct. Reliance was placed by the learned counsel on the decision of the High Court of Patna in **Jatru Pahan and another v. Mahatma Ambikajit Prasad and another (AIR 1957 Patna 570),** High Court of Bombay in **Manohar Shivram Swami v. Mahadeo Guruling Swami (AIR 1988 Bombay 116)** and Division Bench of this court in F**atima v. Saraswathi Amma (AIR 1986 Kearla 56).** It was argued that relevant clause in Ext.A2 is void and appellants are not entitled to the decree granted by the trial court.

7. Section 10 of Transfer of Properties Act reads,

> "10. Condition restraining alienation:- Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit

> of the lessor or those claiming under him:provided that property may be transferred to or for the benefit of a women (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

The principle underlying the section is that a right of transfer is incidental to and inseparable from, the beneficial ownership of property. If an absolute estate is created and after the creation of such estate, a condition which brings a diminution of that absolute estate is imposed on the person in whose favour the absolute estate is created the said condition being repugnant to the very nature of the estate which was created is void and unenforceable. The principle is founded on the principle of public policy allowing free disposition of property. Section 11 of Transfer of property Act embodies principles of universal application that when the main object of transferor is to make an absolute transfer, an inconsistent provision therein cannot be given effect to. Section 11 reads,

> 11. Restriction repugnant to interest created-Where, on a

> transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.
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> Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

The very object of the Section is to provide that the transferor shall not be allowed to put a clog or restriction on the right of a vendee so as to be repugnant to the property sold.

8. Ext.A2 is an outright sale whereunder rights of the assignor was transfered to the assignee respondent absolutely. True, purpose of purchasing the property as shown in Ext.A2 is for construction for a private college

in the property. It also provides that in the event of failure of respondent to construct a college the property shall be reconveyed to the vendor for the same sale consideration. It is also true that there is no express provision in Ext.A2 that respondent shall not sell the property to anybody else. But as rightly pointed out by learned counsel appearing for respondent, when Ext.A2 expressly mandates that if respondent fails to construct the college, the property shall be recoveyed to the assignor, even in the absence of a specific clause prohibiting sale of property to a third party such a condition is implied. If the assignee is at liberty to sell the property to any third party, the mandate that property shall be reconveyed to the assignor and that too for the same sale consideration is redundant. A proper appreciation of Ext.A2 reveal that if college is not constructed in the property, it shall be reconveyed for the same consideration to the assignor. It does not even provide for any period for such reconveyance. If that be so, it can only be said that the relevant clause in Ext.A2 prohibit the respondent vendee from selling the property except to the vendor. If that be so, question is whether the provision is void, in view of Section 10 of Transfer

of Property Act.

9. When an absolute right is transfered in favour of the plaintiff under Ext.A2 and Ext.A2 contains a condition limiting that right restricting the rights of respondent to sell the property except to the assignor, the said clause would definitely come within the mischief of Section 10 of Transfer of Property Act. If so the said clause is void.

10. A Division Bench of High Court of Allahabad had occasion to consider a similar clause in **Gayasi Ram and others v. Shahabuddin and others (AIR 1935 Allahabad 493).** In that case the sale deed contained a clause that the vendee shall not transfer the house by mortgage, gift or sell to any one except the vendor or his heirs and if in contravention of the clause, the property is sold the vendor or his heir would have a right to get back the house by paying Rs.175/- and if the property is to be sold in court auction sale, the sale would be invalid. The sale consideration for the house was Rs.150/-. Relying on decision of the Single Judge of that court in **Dal Singh v. Khub Chand (AIR 1921 Allahabad 97), Asghari Begam v. Maula Bakhsh (1929 Allahabad 381**) and **Gomti Singh v. Anari Kuar 1929 Allahabad 492**) the Division Bench held

that the sale deed in question was between strangers and the clause is an absolute restraint on alienation to anyone except the vendor or his heirs and therefore void in view of Section 10 of Transfer of Property Act. The Division Bench held

> "The condition in restraint of alienation in the present case is contrary to Section 10 of Transfer of Property Act and therefore void".

11. A Division Bench of High Court of Patna in Jatru Pahan's case (supra) considered the scope of Section 10 of Transfer of Property Act in the back ground of a partition deed containing a clause that during life time of the sharer, he shall not sell the share allotted to him or transfer the same in any manner. The Division Bench held,

> "(18) The principle underlying this section is that a right of transfer is incidental to and, inseparable from, the beneficial ownership of property. An absolute restraint, therefore, on that power is repugnant to the nature of the estate, and an exception to the very essence of the grant. It is the essence of an

> immovable property that it confers free power of alienation, and alienation of such a property cannot be made upon the condition that the alienee shall not alienate the land to any.
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> This condition is void, because when a man alienates his property he has the power to alienate to any person by the law; for if such a condition would be given, then the condition would oust him of all the power which the law gives him which should be against reason, and, therefore, such a condition is void. The rule in this section that a condition of absolute restraint of alienation is void, is funded on the principle of public policy allowing free circulation and disposition of property. The court have always leant against any device to render an estate inalienable. This is the general and basic principle underlying this section."

12. A learned Single Judge of High Court, Bombay in Manohar's case (supra) had considered the clause in a sale deed prohibiting sale to some one outside the family. The relevant clause reads,

> "If it is necessary to transfer the aforesaid property by any instrument, I shall transfer it into Your Jangam family and not to others. The property is sold on this condition."

Following the Division Bench decision of Allahabad High Court in Gayashi Ram's case (supra), learned Single Judge held that the said clause would amount to absolute restraint on transfer and therefore void as provided under Section 10 of Transfer of Property Act.

13. Division Bench of this court in Fathima's case considered the effect of a clause in a family settlement whereunder property was settled in favour of 4th son with a condition that he shall not alienate or encumber the property at any time and after his death it would devolve on successive descendants. Division Bench considered the scope of Section 10 in the light of the restrictions provided under the document. It was held,

> "9. What then were the restrictions? They were two fold: (i) Suresh could not encumber or alienate the two items comprised in his share and (ii) the items should devolve on his descendants for successive generations. The trial

court held that first restriction was void in view of S.10 of T.P.Act; and the agreement is that the said provision could not apply to partitions or family arrangements which do not really involve transfers. A number of decisions were cited in support of the provisions that S.10 of the T.P.Act could not apply to partitions or settlements: but there are also decisions which hold that though not in terms, the principle underlying the Section could apply to such arrangements also. In Panchali v. Manni, 1963 Ker LT 168: (AIR 1963 Ker 66) a Full Bench of this Court noticed that there was controversy over the question whether partition would amount to transfer, but preferred to take the view that it would not. It was however observed:-

> "It is true that the proponderance of authority is in favour of a partition being treated as a transfer for the purposes of S.53 of the T.P.Act, 1882. The correct view, as pointed out by Mulla should be that a

> partition is not a transfer and, therefore not strictly within that section; but that the principle of the section will apply to a fraudulent partition, the object of which is not merely to give a sharer his rightful shares in the family property, but to effect the partition in such a way that such sharer would be able to defeat the creditors."

In T.V.Sangham v. Shanmughasundaram, (AIR 1939 Mad 769) a Full Bench of the Madras High Court however applied S.10 of the T.P.Act to the case of a partition. According to the Patna High Court (Jatru Pahan v. Ambikajit Prasad AIR 1957 Patna 570) partition does not involve any transfer of property, but the Bombay High Court (Jagannathpuri Guru v. Godabai AIR 1968 Bom 25) has taken a different view, We think it will not be inappropriate to proceed on the basis that Ss.10 to 14 of the T.P.Act and the corresponding provisions of the Indian Succession Act are but statutory recognition of principles even otherwise well settled. To impose a total restraint on transfer of property or to to impose rules which keep

> it out of circulation for ever offends public policy, irrespective of whether such conditions are imposed by a deed of transfer, a will or a simple contract. A contract opposed to public policy is unenforceable; and in this view of the matter, the restrictive clauses in Ext.A2 have to be held as inoperative. If that is so, the conclusion must follow that Suresh had taken his share in the same manner as the others had taken theirs."

14. Though Ext.A2 does not contain a specific clause prohibiting respondent from alienating the property to third parties, there is an implied clause that in the event of failure to construct a college, the property shall be reconveyed to the assignor at the same price thereby shutting out any other option. It is an absolute restraint on the right of respondent to deal with the property including alienation, which is void as provided under Section 10. First Appellate court rightly interpreted Ext.A2 and held that appellants are not entitled to the decree granted by trial court. Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.548 OF 1994

14th September 2007

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